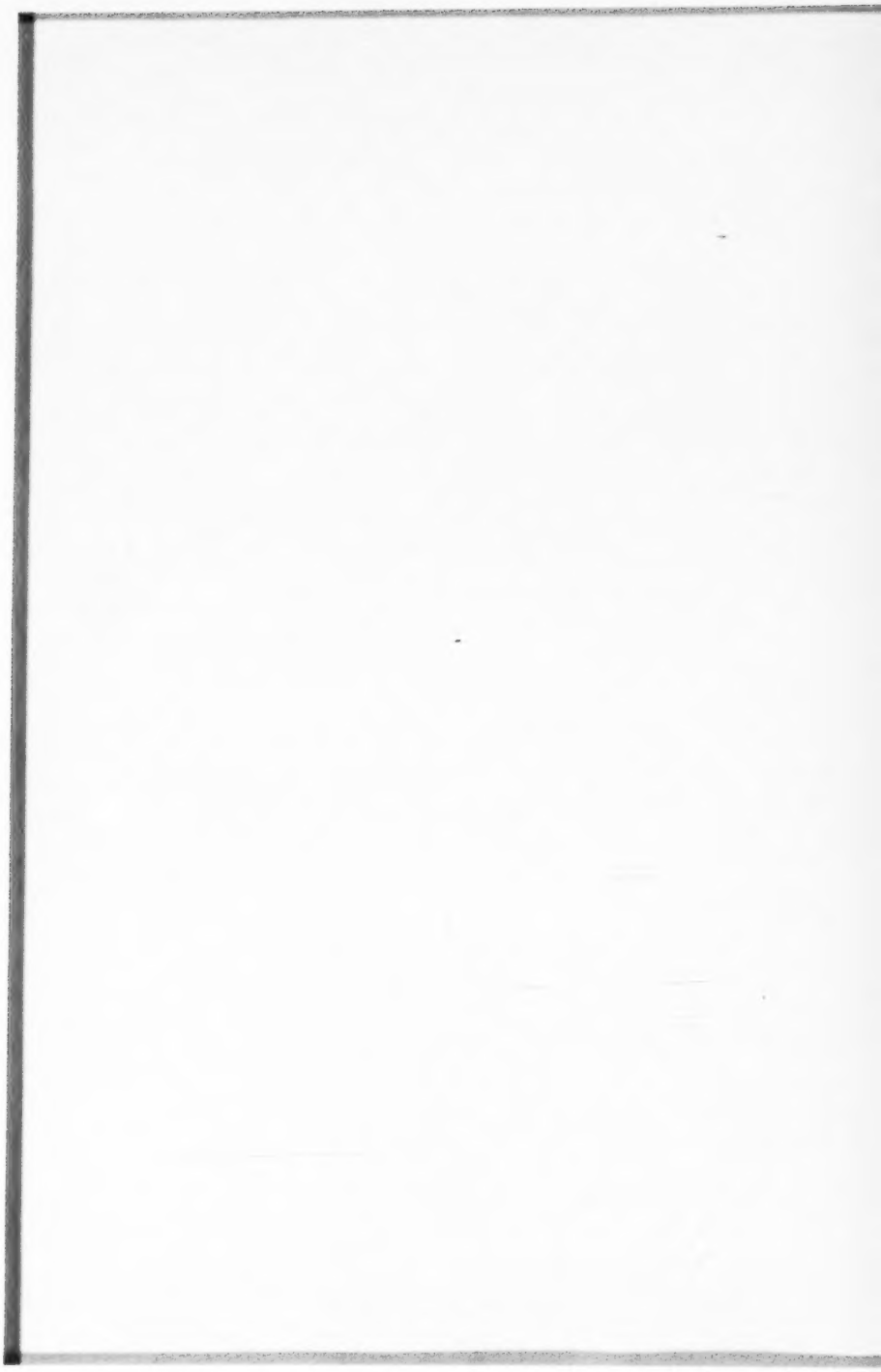

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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# No. 987

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SABINE TOWING COMPANY, INCORPORATED,
*Petitioner,*

*vs.*

CONTINENTAL INSURANCE COMPANY,
INCORPORATED.

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## REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION.

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M. A. Grace,
Edwin H. Grace,
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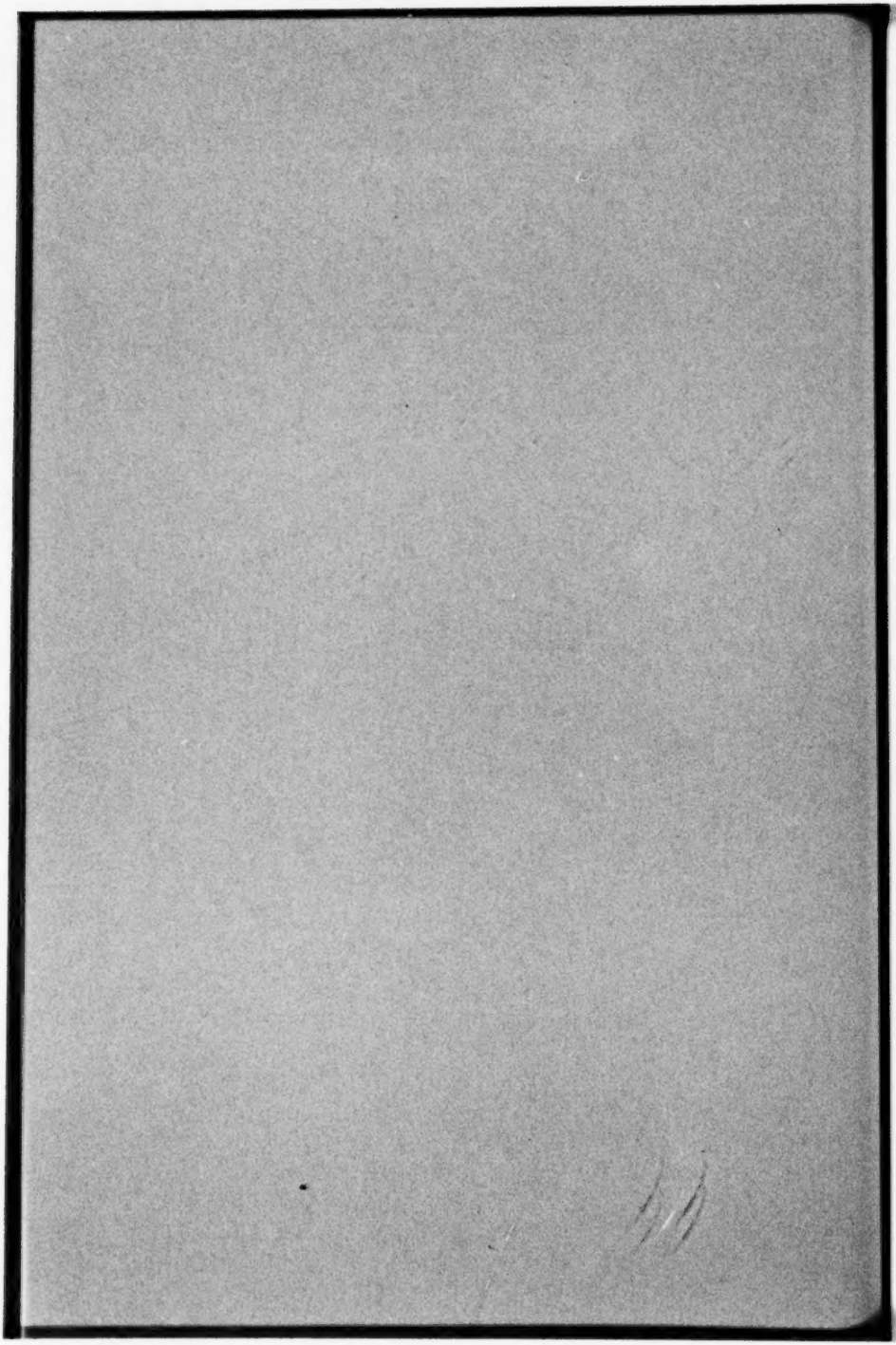

SUPREME COURT OF THE UNITED STATES

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SABINE TOWING COMPANY, INCORPORATED,
*Petitioner,*

*vs.*

CONTINENTAL INSURANCE COMPANY, INCORPORATED,
*Respondent.*

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## REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION.

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*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, the Sabine Towing Company, Inc., respectfully submits the following comments in reply to respondent's brief in opposition.

Petitioner in the petition for writ of certiorari has fully set out the questions involved herein, all questions of law. It is not, therefore, the purpose to here again discuss these questions, other than to point out that a reading of the first two pages of the brief in opposition wherein respondent purports to state the questions involved and the reasons "assigned by petitioner" for granting the writ not only

does not give an appreciation thereof, but tends to confuse same.

Since filing the petition for writ of certiorari herein, and on Monday, May 26, 1941, this Honorable Court entered an order denying a petition for writ of certiorari in cause No. 988, New York and Cuba Mail Steamship Company, petitioner, against The Continental Insurance Company, of the City of New York, respondent. The respondent in that case is respondent here. That suit is also a suit on a protection and indemnity policy and is referred to in the instant case in the court below and in briefs of the respective parties, as the *Moro Castle* case. In that case the District Court of New York allowed recovery under the policy. On appeal the United States Circuit Court of Appeals reversed the District Court. From this decision of reversal the libellant appellee in the court below made application for writ of certiorari and which, as stated, was denied.

The reference made to that case by petitioner herein was with respect to what was said by the Circuit Court of Appeals in that case and wherein, in referring to the words "actual fault or privity" as used in the *Moro Castle* policy and the words "privity or knowledge" as used in the statute stated:

> "* * * the analogy between the statutory provision for limited liability and a contract by a paid insurer to relieve the promisee of loss should not be pressed too far."

This language was referred to by petitioner in comparison with what was stated by the Circuit Court of Appeals in the instant case, wherein referring to the words "fault or privity" of the policy herein, and privity or knowledge of the statute said:

> "We think it has the same meaning and effect when used in the policy in suit."

and with what was said by Circuit Judge McCord in dissenting from the majority court in the instant case.

> "The words 'fault or privity' as used in the policy of insurance should not be limited to the interpretation placed upon similar language used in the American and English Limitation of Liability Statutes."

The *Moro Castle* case differs from the instant case in a number of respects among which we refer to the following. It was a suit in admiralty. The instant case was a suit at law, with a jury waived. On appeal in admiralty the *Moro Castle* case was a trial *de novo*. That case as stated in brief in opposition "* * * involves mainly questions of fact." In reply brief of petitioner in the *Moro Castle* case, it was stated with respect to the findings of fact of the District Court, "those findings were entitled to respect, but were substantially disregarded by the Circuit Court of Appeals * * *" In the instant case, questions of law alone are involved. It is not urged in the brief in opposition filed herein that this case involves questions of fact. In the *Moro Castle* case and as stated in the opinion of the Circuit Court of Appeals, "Libellant admitted that the officers and crew of the ship were guilty of various infractions of the Safety at Sea statutes and regulations," and further stated "on all the evidence we think that was such actual fault or privity of the libellant in the violation of safety statutes as to take the loss outside the scope of the policy." In the opinion, the court further says, "the words of the policy here go somewhat beyond the limitation statute in that they expressly except liability which arises only from the neglect of the assured, or the managing officers of its organization. Torresson neglect here was a neglect of libellant which is inexcusable where dangers at sea are involved and which excludes liability upon the policy." And

further says, "All these offenses were serious, flagrant and long continued." In the *Moro Castle* case the libellant and its vice president had been convicted of violating the criminal statutes with respect to "loss of life by misconduct of officers of vessel; liability of corporation and officers 18 U. S. C. A. Sec. 461.

The policy in the *Moro Castle* case, in addition to containing a privity clause also contained a clause relieving the underwriter from liability "for any loss, damage or expense to which the assured or the managing officers of his organization are privy, or which arises from his or their act or neglect." This clause as to fault or neglect is not contained in the policy in the instant case.

In the instant case, and as pointed out in the petition for writ of certiorari, the petitioner was acting in good faith throughout and the fault found, and on which it was denied the right to limit its liability was imputed to petitioner.

If the negligence found in the instant case had been found to be wilful, deliberate or intentional, or so gross as to amount to that (but it was not so found), the loss would not be one covered by the policy. In the *Moro Castle* case the negligence found could be so considered. The decision rests on the particular facts therein before the Court.

The United States Circuit Court of Appeals in its majority opinion in reversing the lower court did not do so because of any different view as to the facts, but on the ground that petitioner (acting in good faith) was denied the right to limit its statutory liability because of a finding of privity or knowledge, that this finding, as a matter of law, barred recovery by petitioner herein in a subsequent suit, the instant case, on the policy containing the words "fault or privity." The majority courts holding that the words fault or privity as used in the policy had the same meaning as privity or knowledge, as used in the statute,

and that parol evidence of insurance men, to the effect that as used in the insurance world they had a different meaning—the meaning attributed to them by the District Court was inadmissible.

It is respectfully submitted that the writ should be granted.

M. A. Grace,
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John D., M. A., & Edwin H. Grace,
*Counsel for Petitioner.*

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